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IS THE EIGHTEENTH AMENDMENT VOID BECAUSE OF ITS CONTENTS?

Is an alteration of the Constitution of the United States a valid amendment regardless of its substance if proposed and adopted in conformity with the procedure prescribed in the amendment clause of the Constitution? It has usually been supposed that the people of the United States, without resort to revolution either violent or peaceful but by orderly and legal methods may bring about any change they see fit in their political organization or in the governmental machinery which they have for the time adopted, or in the powers of the various organs of government.

That an amendment of the United States Constitution might be invalid because of its substance was urged in Congress in the debates over the proposal of the Fourteenth Amendment,¹ faintly mentioned as a tenable proposition in the *Harvard Law Review*² a few years ago as to assumed amendments of very extreme character;—and strongly posed as a debatable legal issue in the December number of that Review,³ without an attempt “to discuss this vast question exhaustively, or to present all the arguments

¹Congressional Globe, 40th Cong., 3rd Sess., 705 *et seq.* (*per* Dixon of Connecticut); 988 (*per* Hendricks of Indiana); 995, 997, 1631 (*per* Davis of Kentucky); 1639 (*per* Buckalew of Pennsylvania). *Ibid.*, Appendix, 151 (*per* Doolittle of Wisconsin); 158-164 (*per* Saulsbury of Delaware); 285 (*per* Davis of Kentucky). For these citations the writer is indebted to the article referred to in the next note.

²Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?* 23 *Harvard Law Rev.* 169, esp. pp. 170-171. It will be noted, however, that Mr. Machen's principal doubts about the Fifteenth Amendment turned upon the question whether it did not in effect deprive some States of their equal vote in the Senate without their consent, not having been unanimously ratified; that is, that it was void because not adopted by the method, or with that quantity of favorable vote expressly required for an amendment of the character assumed.

³William L. Marbury, *The Limitations Upon the Amending Power*, 33 *Harvard Law Rev.* 223.

which could be made against the validity of constitutional amendments of the character considered."⁴ Finally in the January number of the Cornell Law Quarterly⁵ the question is put, not *ought* there to be, but *Is there an Eighteenth Amendment?* and the answer is given that conceding the regularity of the procedure of proposal and adoption there is no such amendment because the substance of that alleged amendment is beyond the power of the amending machinery to incorporate into the Constitution. These essays and one in the February number of the Columbia Law Review invoking the doctrine of "inalienable" or natural rights as a basis for declaring the Eighteenth Amendment invalid have provoked the writer to make reply.

When so much space is given to error, a little should be allowed for truth to combat it; sometimes error gains a disturbing vogue. This was so in recent years of the charge that the doctrine of *Marbury v. Madison* was a usurpation by the court in spite of clear demonstration of the correctness of that decision as a sound interpretation of the language of the Constitution, strongly corroborated by historical evidence of the intentions and understanding of the framers of the instrument and of the delegates to the conventions that ratified it.⁶ Neither reformer nor conservative should be allowed to go far along unsound lines.

What Marshall said of the question decided in *Marbury v. Madison* may be said of the present one. This "is a question deeply interesting to the United States; but, happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."

A fundamental error running through all these provoking essays is the confounding of government with sovereignty, a failure to distinguish between a political society or state and the active agencies or governmental organs which that society creates and endows with power. Thus one essayist asserts as conclusive of the existence of "inalienable rights" that "the indisputable truth is that there are rights which no government can lawfully invade." True

⁴*Ibid.*, p. 235.

⁵ Cornell Law Quarterly 113.

⁶Brinton Coxe, *Judicial Power and Unconstitutional Legislation*; Charles A. Beard, *The Supreme Court and the Constitution*.

it is, that *in this country* individuals have some privileges beyond the reach of *government*, but solely because our political society has created no government with unlimited power. Always, by withholding power from government or by placing restrictions upon powers granted have we created in this country spheres of individual liberty or immunity from governmental interference. This is the function of constitutional limitations. To make these immunities thus created really legal immunities society has authorized and commanded the judicial branches of government to enforce these restrictions, to apply these constitutional limitations, to regard these fundamental laws as superior to any merely government-made law. If a person claims to find any solace in "rights" not created by law, not sanctioned by organized society, let him try his luck in one of those conditions of disorganization such as France saw at some moments of her great revolution or that Russia has recently experienced. Is it not axiomatic that legal rights exist only by law; and that law must, to be law, have the sanction of society? If the privileges or immunities of a human being from interference by other persons in private or official station rest ultimately upon the control which organized society exerts against potentially hostile persons or forces, it seems that the individual must content himself with such privileges or immunities as the society in which he lives is willing to concede him. There must be some give and take in all co-operative enterprises among human beings.

Against a sovereign organized political society an individual member of it has no *legal* rights. That, at least, is the situation under the present state of organization or unorganization of the human race into separate, independent, sovereign societies. There is no law superior to their wills governing their relations with their own members. On the other hand, as against government, in the United States, our political society has secured to the individual many privileges and immunities. What society has thus created, cannot society take away or alter? *Legally*, certainly society may do so. What recourse has the individual? He may cancel his membership, renounce his allegiance, a privilege favored by our laws,⁷ and remove from the territory over which that society has jurisdiction. He may revolt singly, subject to the penalties of the law. He may revolt in combination with others,

⁷Act of Congress, July 27, 1868, 15 Stat. 223, Rev. Stat. §§ 1999, 2000, 2001. See 3 Moore, *International Law Digest*, 579 ff.

likewise taking the risk of consequences. There is not wanting highly respectable literature commending the latter course of conduct, where the privileges and immunities conceded by the society of which the revolters have been members are so few as to seriously burden the pursuit of life, liberty and happiness. Such is that splendid document the Declaration of Independence in which a large number of British subjects in America justified their revolt from the political society of which they had been a part and appealed to the consciences of the world in vindication of the *moral* rectitude of their rebellion. They well knew that they must not only all hang together, but hang together to success, or hang separately. They knew that legally they had no standing except as traitors. When the fortunate outcome of independence was attained they also knew that thereby they had secured no individual liberty, privileges or immunities, and they set about framing constitutions to create such liberties. They knew also that it was beyond the wisdom of any one generation to hit upon a permanently workable balance between the powers necessary to government for the collective welfare and the freedom or immunity that might be conceded the individual, and consequently made provision for amendments whereby readjustments could be made in one direction or the other.

A newly organized society set out upon its cycle of experience. No more than any other previous political society has it conceded to the individual the full self-determination of his rights, which would be an absurdity in any organization of society, but it has created a larger sphere of individual liberty, freed the individual more largely from the interference of government, than any other political society has ever done and, moreover, the method provided for amendment of the Constitution is such as to secure this sphere of liberty beyond the reach of the transient impulses of a mere majority.

So much for the general principle of "inalienable" rights. It is rather amusing that this notion which has had so little currency since the eighteenth century should have been revived as against the contents of the Eighteenth Amendment. It has long been the settled course of construction of our constitutions not only that sovereign society can prohibit the manufacture and sale of intoxicants but that they have delegated this power to their governments. State statutes prohibiting the manufacture and sale in intra-state commerce were valid and it has been settled that Congress had

the power to prohibit the sale of intoxicants in interstate commerce.⁸

One might ask what is the status of an "inalienable" right or liberty which has been alienated. It seems obvious that it can be regained only by constitutional amendment or by revolution. What the Eighteenth Amendment has done is merely to take a power previously vested in government, partly in the organs of nation-wide government and partly in the organs of local or state government, and vest it as a whole in each of these governments to be exercised concurrently. It is the fear that government may now exercise this power more efficiently that has fathered this belated contention that organized society cannot vest it in government.

Another of the essayists attacks along an entirely different line. The gist of his contention is, that this re-arrangement of the power as between the nation-wide government and the local or state governments could not be brought about by the process of amendment prescribed in Article V of the national Constitution. His main objection is that in this re-arrangement of the power the nation-wide government is given more of it than that government had possessed under the distribution of powers previously made by the Constitution; that under the previous distribution it lay with each State to say whether or not the manufacture and intra-state sale of intoxicants, within its limits, should be allowed or forbidden, and he contends that no State could be deprived of its previous power of determining this matter without its consent. He assumes his desired conclusions as follows:

"The soundness of three legal propositions must be apparent without any very deep reading of the constitution or prolonged reflection on the theory of our government, namely, first, that intra-state prohibition cannot be the subject of a valid constitutional amendment in the sense in which amendments are referred to in the constitution; second, that such prohibition cannot be grafted upon the constitution without the consent of the people of all the states; and third, that such consent cannot be given by the legislatures of the states, but must come from conventions duly convened in accordance with a specific vote of a majority of the enfranchised citizens of the states respectively."⁹

⁸For full discussions of governmental power over intoxicants prior to the Eighteenth Amendment, see D. O. McGovney, *The Webb-Kenyon Law and Beyond*, 3 *Iowa Law Bulletin*, 145; Charles H. Safely, *Growth of State Power Under Federal Constitution to Regulate Traffic in Intoxicating Liquors*, 3 *Iowa Law Bulletin*, 221.

⁹Justin DuPratt White, *Is There an Eighteenth Amendment?* 5 *Cornell Law Quarterly*, 113-114.

The Constitution provides for ratification of proposals for amendment by such conventions, but it also provides that ratification by conventions in three-fourths of the States is sufficient.¹⁰ The writer would throw us back upon his first assumption that this applies only to "amendments" in a restricted sense. He would have us divide changes in the Constitution into what he might term amending changes and ultra-amending changes, the latter being permissible under the Constitution but validly ratified only by the unanimous consent of conventions representing the majority of the people of every State, the people of each state acting separately. What is this other than an application of the pre-Civil War doctrine of State sovereignty? True, he quotes with approval Marshall's famous opinion in *McCulloch v. Maryland* in which the doctrine of national sovereignty is most forcefully expounded, that sovereignty in the United States is vested in the whole people of the United States conceived of as a single group of people, as one national state. His own language, however, does not indicate a complete appreciation of this fundamental conception. He applies the expression "sovereign government" to the central government of the United States and speaks also of "sovereign states," referring to our domestic commonwealths. Story long since pointed out the ambiguous use of the term sovereignty.¹¹ One is the ultimate and uncontrolled power in a society to make or change its constitution. In this sense no one of the divisions of the United States called a State is sovereign. Even the proviso of Article V that "no State, without its consent, shall be deprived of its equal suffrage in the Senate" denies to a State the privilege of having such representation as it alone chooses. All the express and implied limitations upon the States contained in the original seven articles of the Constitution deny State sovereignty *under the Constitution*. This has always been so obvious that the pre-Civil War doctrine of State-sovereignty boiled down to the contention that the Union was a league or compact of Sovereign States in the sense that any State might when it saw fit withdraw from the union or compact. So long as a State remained in the Union it had to be conceded that it was subject to the limits of the Constitution even if it were only

¹⁰Except that "no State, without its consent, shall be deprived of its equal suffrage in the Senate" U. S. Const. Art. V.

¹¹I Commentaries on the Constitution (5th ed.) §§ 207 ff.

a compact. Did a State have this sovereign right to withdraw? Could a State constitutionally secede? This was the great constitutional issue of the Civil War. The answer of the courts was that secession is rebellion. Far more than a majority of the people of the United States negated the asserted right. The people by arms suppressed the *rebellion*. The result was a clear-cut and definite decision that the people of each State in the Union had under the Constitution merged into that larger whole, the people of the United States; that the Constitution of the United States was the constitution of a nation.

Was this the correct interpretation of the Constitution at the time of its adoption, or was it the result of evolution or of the compulsion of arms? Was the Civil War a revolutionary change in the Constitution produced by the Northern military success? While this is academic with reference to the present effect of the Constitution, it may be said that as constitutional historians become less biased the more is there agreement that the preponderance of the evidence presented by the events in American political history from the time of our revolt from the British empire to and through the drafting and adoption of the present Constitution is, that a nation adopted that Constitution. Students of constitutional law, whether they be lawyers, judges or professors, also have come more and more into agreement, as have the constitutional historians, that on the sound principle of interpreting a constitution as a whole, giving weight to its effect in its entirety as against conflicting views that particular provisions or isolated phraseology might suggest, nothing but a constitution by a nation for a nation can be made of it; and that the nation therein *authorized* a dual system of government, created a central government on the one hand with its machinery or organs determined and, upon the other hand, made provision for local self-government in the divisions called States, leaving to the people in each such division to devise the machinery or organs which were to exercise their powers of local self-government. Moreover, and most significantly, the nation fixed for the time being the limits of governmental power as between the organs of nation-wide government and the organs of local divisional government. The nation in the Constitution, as interpreted by the Supreme Court, also made the organs of nation-wide government and the organs of local or state government, in the main, mutually independent of each other, by assigning to each its sphere. It is only in the sense of this *independence*, as Story pointed out, that

the expressions sovereign government or sovereign State are correct. Attentive reading of the judicial opinions in which such expressions occur will show that nothing more is meant. In an essay devoted to a discussion of the power to make or change constitutions sovereignty should be used only in its broader sense.

In saying that the Civil War definitely cut off debate, and confirmed—perhaps that is the right word—sovereignty as residing in the nation, destroying for ever the old State-sovereignty doctrine, it might be said parenthetically that it did not settle “state rights” merely as a question as to the scope of the governmental powers of the central government and the States under the terms of the Constitution as it may read at any given time. What is the true construction of the Constitution as to the distribution of governmental power, as to the extent of the power of the nation-wide government, on the one hand, and of the local or State governments, on the other, will doubtless continue a live subject, arising perhaps more rarely as the accumulating decisions tend more and more to cover the field.

The question before us is one of sovereignty. How can the odd machinery for amendment prescribed in Article V of the Constitution be reconciled with the doctrine that sovereignty resides in the whole people of the United States conceived of as one nation? A referendum to the people at large is not provided for. The answer is that this machinery consists throughout of representatives of the people. Either ordinary representative organs or extraordinary ones are to voice the will of the people, partly for the sake of convenience, partly to impose conservative checks against hasty action. One permissible combination of proposing and ratifying organs more directly than the others illustrates this. Amendments may be proposed by a national convention and ratified by special conventions of the people assembled in their respective local or State divisions. Such a national convention may be called only by Congress, representing the people, and only when two-thirds of the legislatures representing the people in their local divisions demand that such a call be made. Another combination, that hitherto employed, makes use wholly of the regular organs of popular representation:—proposal by Congress ratified by legislatures.

That it is the people of the nation who have made and may change the Constitution is not the theory only of professors and bookwriters but the accepted view of men called by their official position to speak with authority may best be driven home by

quoting from them. Many so called upon to speak have been justices of the Supreme Court of the United States. First James Wilson, who not only was one of the first justices of the Supreme Court, but also a delegate to the convention that drafted the Constitution and a delegate to one of the conventions that adopted it.

James Wilson (1787) in the Pennsylvania convention:—

"*Representation* is the chain of communication between the people and those to whom they have committed the exercise of the powers of government. This chain may consist of one or more links."¹²

Justice James Wilson in *Chisholm v. Georgia*:—¹³

"The *States*, rather than the *PEOPLE*, for whose sakes the States exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the *United States*. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? '*The United States*,' instead of the '*People of the United States*,' is the toast given. This is not *politically* correct. The toast is meant to present to view the *first* great object in the *Union*: It presents only the *second*: It presents only the *artificial* person, instead of the *natural* persons, who spoke it into existence."

Speaking of the preamble Justice Wilson adds:

"Our national scene opens with the most magnificent object, which the nation could present. '*The PEOPLE of the United States*' are the first personages introduced."¹⁴

Again he says,

"To the Constitution of the *United States* the term *SOVEREIGN*, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that Constitution. They *might* have announced themselves '*SOVEREIGN*' people of the *United States*: But serenely conscious of the *fact*, they avoided the *ostentatious declaration*."¹⁵

In the adopting convention in Pennsylvania, Wilson had said:—

¹² Elliot's Debates 424.

¹³ (1793) 2 Dall (2 U. S.) 419, 462.

¹⁴ *Ibid.*, p. 463.

¹⁵ *Ibid.*, p. 454.

"I had occasion, on a former day, to mention that the leading principle in the politics, and that which pervades the American Constitutions, is, that the supreme power resides in the people. This Constitution, Mr. President, opens with a solemn and practical recognition of that principle:—'We, the *people of the United States*, in order to form a more perfect union, establish justice, *etc.* do ordain and establish this Constitution for the United States of America.' It is announced in *their* name—it receives its political existence from *their* authority: they ordain and establish. What is the necessary consequence? Those who ordain and establish have the power, if they think proper, to repeal and annul."¹⁶

Chief Justice Jay in *Chisholm v. Georgia*:—¹⁷

"The Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of *Great Britain*, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared with becoming dignity, 'We the *people of the United States*, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform."

With broad-mindedness Justice Jay recognized that some details of the political history of the origin of the United States

¹⁶2 Elliot's Debates 434-435.

¹⁷(1793) 2 Dall (2 U. S.) 470-471.

bore one way, some another, and rested his conclusion upon the preponderance and general effect of them taken as a whole. He saw that the term sovereignty as applied to one of our States or Commonwealths under the Constitution, having but limited powers, could be correctly used only in a qualified sense, always with a mental reservation. Sovereignty resides in the people of the nation as one body. By the Constitution they established a government of nation-wide authority, with enumerated powers; and confided to the sub-divisions of the nation, those communities called States, authority to govern themselves in their local affairs. What machinery these local communities should create to exercise local powers was left to them to decide. So whether all the power thus left to the people of any one of these local communities should be vested in the organs of government which they might establish was also left to them. Since in determining the form of their local government and the portion of their own power which they should vest in their local government the people of each community was permitted to act under no restraint other than this, that they had only a limited portion of power to thus dispose of, they could go about this matter *as if they were independent* communities and because of this it has been customary to speak of the people of each state as "sovereign" within their sphere. The people in each State thus act quasi-sovereignly. That is, over their own organs of intra-state government the people of each state are supreme. When it comes to a question whether a given power shall be vested in the national organs of nation-wide government or confided to the people of the respective State communities that is a question for the sovereign (in the strict sense), the nation, the people of the United States. As Chief Justice Jay said: "The sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State."¹⁸

It is common to refer to Chief Justice Marshall as the expounder of nationalism, indeed as if it were a theory invented by him, as if it were a gloss put by him upon the Constitution. It is often overlooked that nationalism has two senses, (1) national sovereignty, (2) a strong central or national government. The latter is not in the least a necessary consequence of the former. The nation, the people of the United States, might have

¹⁸*Ibid.*, p. 471.

seen fit to bestow for the time being upon the organs of nation-wide government very slight power and confided to the local governments the most important powers and the courts might have construed the language of the Constitution narrowly so far as it vested powers in the nation-wide government, the result being to find the national government a very weak one, yet this would in nowise determine the location of sovereignty. The sovereign nation might by amendment increase the power of the national government. Such amendment would in turn be open to interpretation; the question would still be, what is the actual distribution of *governmental* power made by the existing instrument. Such were the questions that came before the Supreme Court while Marshall was Chief Justice.

It was the court's answers to questions of this sort, strongly swayed by the reasoning of Marshall, that gave the latter his reputation for "stalwart nationalism". With nationalism in this sense this essay has nothing to do. Our question is not, what is the distribution of *governmental* power made by the provisions of the Constitution as they stand at any given time, but the question is, who made the distribution and who can peacefully and legally change that distribution. That the nation made the existing distribution and may alter it is the doctrine of national sovereignty;—that this power is vested in the whole people of the United States conceived of as one nation, or one body of people.

It is not meant to suggest that Marshall did not agree with his predecessors, in national sovereignty. He undoubtedly did.

"The American people, in the conventions of their respective States, adopted the present Constitution."¹⁹

Evidently twitted with the suggestion that the people's representatives appointed to vote on adoption assembled in the States severally, he answered, "Where else should they have assembled?"²⁰ The notion of a plebiscite was foreign to a people who habitually practiced expression of popular will through representatives. A single joint convention of large numbers was out of the question in a country relatively vast because of lack of travel facilities. Besides the Constitution was to go into effect over those people a majority of whom adhered to it, and it was the will of the people not the machinery of expression that was vital.

¹⁹Cohens v. Virginia (1821) 6 Wheat. (19 U. S.) 264, 381.

²⁰McCulloch v. Maryland (1819) 4 Wheat. (17 U. S.) 316, 403.

Marshall frankly conceded that in the cases before him what he might say as to national sovereignty was argumentative only, not an issue for decision. Thus in *McCulloch v. Maryland* and *Cohens v. Virginia* the issue was, had those States, or as Wilson would have put it, had the people of those States, subordinated themselves to the national *government* within the scope of the powers granted to it. Marshall said:

“‘This Constitution * * * shall be the supreme law of the land.’ * * * This is the authoritative language of the American people; and, if gentlemen please, of the American States.”²¹

But Marshall expressed his real opinion thus:

“The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any subdivision of them.”²²

Jefferson who attacked the decision in *Cohens v. Virginia* on the ground that one organ, the judiciary, of the nation-wide government had undertaken to decide as to the distribution of power made by the constitution between the nation-wide government itself and what he called the “special governments”²³ (the States) said that it was for the people of the nation to decide such questions in a convention called under the authority of the Amendment Clause of the Constitution. Said Jefferson:—

“The ultimate arbiter is the people of the Union assembled by their deputies in convention, at the call of Congress, or of two-thirds of the States. Let them decide to which they mean to give an authority claimed by two of their organs. And it has been the peculiar wisdom and felicity of our Constitution to have provided this peaceable appeal, where that of other nations is at once to force.”²⁴

Swayne, J., in *White v. Hart*:²⁵

“The National Constitution was, as its preamble recites, ordained and established by the people of the United States. * * * The government of the Nation and the government of the States

²¹*Cohens v. Virginia* (1821) 6 Wheat. (19 U. S.) 264, 381.

²²*Ibid.*, p. 389.

²³Ford, Writings of Jefferson, 189.

²⁴*Ibid.*, p. 229, 232.

²⁵(1871) 13 Wall. (80 U. S.) 646, 650.

are each alike absolute and independent of each other in their respective spheres of action. * * * For all the purposes of the National government, the people of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by State lines for the purposes of State government and local administration."

Bradley, *J.*, in *Keith v. Clark*:²⁶

"The people of the United States, as one great political community, have willed that a certain portion of the government, including all foreign intercourse, and the public relations of the nation, and all matters of a general and national character, which are specified in the Constitution, should be deposited in and exercised by a national government; and that all matters of merely local interest should be deposited in and exercised by the State governments."

Brewer, *J.*, delivering the opinion of the court in *Kansas v. Colorado*:²⁷

"The preamble of the Constitution declares who framed it, 'we the people of the United States' * * * The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution, by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated."

James Wilson, (1787) in the Pennsylvania convention:—

"When the principle is once settled that *the people* are the source of authority, the consequence is, that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good."²⁸

James Iredell (1788), later a justice of the United States Supreme Court, said in the North Carolina convention:—

"By referring this business to the legislatures, expense would be saved; and in general, it may be presumed, they would speak the genuine sense of the people. It may, however, on some occasions, be better to consult an immediate delegation for that special purpose. This is therefore left discretionary. It is highly probable that amendments agreed to in either of these methods would be

²⁶ (1878) 97 U. S. 454, 476.

²⁷ (1907) 206 U. S. 46, 90.

²⁸ 2 Elliot's Debates, 443-444.

conducive to the public welfare, when so large a majority of the states consented to them."²⁹

Iredell also said:—

"The constitution of any government which cannot be regularly amended when its defects are experienced, reduces the people to this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by a civil war. Happy this, the country we live in! The Constitution before us, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of Assembly; not, indeed, quite so easily, which would be extremely impolitic; but it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people."³⁰

The radical Patrick Henry, on the other hand, gave as one of his reasons for opposing adoption, the improbability that any amendment could be obtained. "To suppose", said he, "that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous,"³¹ and he pointed out that the barest majority in the smallest four of the thirteen states could prevent the adoption of any amendment.

Madison answered by pointing out that the greatest evil of the Articles of Confederation was the requirement of unanimous consent of the diverse groups. To his mind a happy compromise had been made. "By the new system, a majority of the states cannot introduce [make] amendments; nor are all the states required for that purpose; three-fourths of them must concur in alterations."³²

Readers who have patiently followed this leisurely exposition of the accepted views of national sovereignty are now ready to hasten to conclusions. Let us summarize.

(1) Sovereignty in the United States resides in the nation, the whole people of the United States as a single nation.

(2) They have themselves prescribed the manner in which they shall amend their constitution. When the machinery whereby they have declared they will express themselves has operated, you have not the act of mere legislatures, mere States, mere conventions but the voice of the sovereign people. The people have

²⁹4 Elliot's Debates, 177.

³⁰*Ibid.*, p. 176-177.

³¹Debates in the adopting convention held in Virginia, 3 Elliot's Debates, 49-50.

³²*Ibid.*, p. 94.

declared that when sufficient of them approve a duly proposed amendment to carry legislatures or conventions in three-fourths of the States the amendment "shall be valid to all intents and purposes as part of this constitution".

But it is argued that this is true only of "amendments"; and that amendment is not coextensively synonymous with "change" or "alter". This may safely be flatly denied.

"Amendment" contains in it an element of euphemism, of conceit in the proposer, an assumption that the proposal is an improvement. Beyond this euphemistic tinge, amendment as applied to alteration of laws, according to current dictionaries means alteration or change. An amendment of a particular statute means, usually it is true a change germane to the subject matter of that statute. Would not any change in a whole code be spoken of as an amendment? Let it be conceded that an amendment must be germane, who shall say that any change whatsoever in the government of this nation would not be germane to the Constitution? That instrument does something to all governmental power whatsoever. As to any and every phase of power, it either confers the power upon the organs of the nation-wide government, "reserves" it to the States, prohibits its exercise by the one or the other, or both, and reserves it to the people. Any change altering these dispositions would therefore be germane to the purposes of the instrument. It is clear that no limitation of the amending power can be found in this notion of necessity for germaneness.

Usage contemporary with the framing and adopting of the Constitution is convincing. The delegates to the drafting and adopting conventions used "amendment" and "alteration" interchangeably. We need not go outside of the fragments quoted in this essay to demonstrate this. See above, Iredell, page 25; Madison, page 26; and below, Spaight, page 30; Rutledge, page 33. Such also was the language of Mason,³³ of Davie,³⁴ of

³³In the margin of his copy of the draft of the Constitution as reported to the convention by the Committee of Style, Mason wrote: "Article 5th—By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." 2 Farrand 629, note.

³⁴Davie said in the North Carolina convention speaking of the drafting convention of which he had been a member: "The business of the Convention was to amend the Confederation by giving it additional powers." 4 Elliot's Debates, 23.

McHenry,³⁵ other casually found instances of the usage of members of the drafting convention.

As to the supposed necessity for the consent of every State to changes of any character, Article V clearly provides that ratification by legislatures or conventions in three-fourths of the States shall be sufficient except in two cases:—

(1) That no amendment shall be made at all prior to 1808 as to specified matters, now obsolete.

(2) "That no State, without its consent, shall be deprived of its equal vote in the Senate."

As Chief Justice Marshall said in *Gibbons v. Ogden*,³⁶ "It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted, * * *." It is clear therefore that ratification by three-fourths applies to every amendment except the one specifically excepted.

Strange it is that it should be argued that a change in the States' so-called police power or power over their internal police should be a further exception. Why should this phase of governmental power be thus singled out? Curiously enough we have the clearest and most emphatic evidence that the convention that drafted the constitution intended that this should not be an exception. On almost the last day of the convention, at the time at which the convention decided to make an exception as to the equal vote of the States in the Senate, a motion was made also to make an exception as to the police power of the States and this motion was rejected by a vote of 8 to 3.³⁷

Let this essay be concluded with a brief history of the action of the convention in arriving at Article V in its present form.

Spaight, a member of the drafting convention, explained to the North Carolina convention the general thought of the drafters in framing the amendment clause. He said:—

"It was thought extremely hard that one state, or even three or four states, should be able to prevent necessary alterations.

³⁵McHenry jotted down in his notes as one of the consoling elements that led him to sign the Constitution, that "alterations may be obtained, it being provided that the concurrence of two-thirds of Congress may at any time introduce them." 2 Farrand, 649.

³⁶(1824) 9 Wheat. (22 U. S.) 1, 191.

³⁷Madison's Debates, under date of September 15; 2 Farrand's Records of the Federal Convention, p. 630.

The very refractory conduct of Rhode Island [during the period of the Confederation] in uniformly opposing every wise and judicious measure, taught us how impolitic it would be to put the general welfare in the power of a few members of the Union."³⁸

Time and space will not be consumed in collating other almost innumerable allusions to this defect in the Articles of Confederation. The defeat of every proposed amendment to that first constitution is the outstanding historical fact that led to the calling of the Philadelphia convention that drafted the present Constitution. It is sufficient to point out that two of the three outlines of constitutions offered at the opening of that convention as suggested bases for discussion made provision for future amendment by less than a unanimous vote. Of these, the Hamilton plan provided for ratification of amendments "by the Legislatures of, or by conventions of deputies chosen by the people in, two-thirds of the States composing the Union";³⁹ and the Pinckney plan proposed:

"The assent of the Legislature of _____ states shall be sufficient to invest future additional powers in U. S. in C. ass. and shall bind the whole confederacy."⁴⁰

The Virginia plan, the one selected as the chief basis for the work of the convention, made only a general suggestion for future amendments. This suggestion was approved July 23⁴¹ and with the other tentatively agreed upon provisions went to the Committee of Detail. That Committee's report (August 6) proposed the following as an amendment clause:—

"On the application of the Legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a convention for that purpose."⁴²

It does not appear whether or not it was the intention of the Committee of Detail that the national convention contemplated should promulgate amendments adopted by it, without submission to the people or other body or bodies. When the con-

³⁸4 Elliott's Debates, 207.

³⁹3 Farrand, p. 630.

⁴⁰That this was the original text of the Pinckney plan, see 2 Farrand, p. 136; 3 *Ibid.*, 595, 609.

⁴¹2 Farrand, p. 84.

⁴²2 Farrand, p. 188.

vention reached this provision of the report (August 30) it passed without objection.⁴³

On September 10, Gerry of Massachusetts moved to reconsider this provision, saying:—"It follows * * * from this article that two-thirds of the States may obtain a convention, a majority of which can bind the Union to innovations that may subvert the State constitutions altogether."

Hamilton seconded the motion, "with a different view from Mr. Gerry"—"He did not object to the consequences stated by Mr. Gerry.—There was no greater evil in subjecting the people of the U. S. to the major voice than the people of a particular State."⁴⁴

He favored an easier mode of amendment. Madison objected to the provision because of the vagueness of the terms, "call a convention for that purpose." On reconsideration, after voting down a motion by Sherman of Connecticut to require ratification by unanimous vote of all the States, Madison, seconded by Hamilton, moved the following:⁴⁵

"The Legislature of the U—— S—— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S."

"Mr. Rutledge [of North Carolina] said he never could agree to give a power by which the Articles relating to slaves might be altered by the States not interested in that property and prejudiced against it" and he moved to add a proviso that the Constitution could not be altered before 1808 so as to permit Congress to prohibit the importation of slaves prior to that year or to lay a capitation or other direct tax on an apportionment which would count more than three-fifths of the slaves. With the Rutledge addition, Madison's motion was adopted.

In this form the Amendment clause went to the Committee of Style and was reported back without change in substance. On

⁴³2 Farrand, p. 467-468.

⁴⁴Madison's Debates, 2 Farrand, pp. 557-558.

⁴⁵2 Farrand, p. 559.

September 15, final disposition was made of it. It will be noted that in the form it had now reached, proposals for amendment could be initiated by Congress only. It was resolved without objection also to *require* Congress to call a convention to initiate amendments, when applied to by the legislatures of two-thirds of the States.

Then also proceedings occurred directly relevant to the present question, quoting from Madison's notes.⁴⁸

"Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate."

* * * * *

"M—— Sherman moved according to his idea above expressed to annex to the end of the article a further proviso 'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.'"

"Mr. Madison. Begin with these special provisos, and every State will insist on them for their boundaries, exports, &c.

"On the motion of Mr. Sherman [it was rejected on a vote of 8 to 3].

"Mr. Sherman then moved to strike out art V altogether.

"Mr. Brearley 2ded. the motion, on which [the vote was, ayes 2, noes 8, and divided 1].

"Mr. Govr. Morris moved to annex a further proviso—'that no State, without its consent shall be deprived of its equal suffrage in the Senate'

"This motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no."

D. O. MCGOVNEY

COLLEGE OF LAW,
STATE UNIVERSITY OF IOWA.

⁴⁸2 Farrand, pp. 629-631.